In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-445

ANTHONY BARRAZA,
Petitioner,
vs. GEORGIA
~~UNITED STATES OF AMERICA~~,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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ANTHONY BARRAZA,
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PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

Petitioner Anthony Barraza prays that a writ of certiorari be issued to review the judgment of the Georgia Court of Appeals.

OPINION BELOW

The published opinion of the Court of Appeals is appended to this Petition as Appendix A and is cited as *Barraza v. State*, 149 Ga. App. 738, 256 S.E.2d 48 (1979).

JURISDICTION

The opinion of the Georgia Court of Appeals was entered on April 9, 1979. Petitioner's petition for rehearing, timely filed, was denied on April 30, 1979. This order is appended to this petition as Appendix B. Petitioner's

application for certiorari to the Georgia Supreme Court was denied June 20, 1979. This order is appended to this petition as Appendix C. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the petitioner's right to the effective assistance of counsel as guaranteed by the due process clause of the Fourteenth Amendment and the Sixth Amendment of the United States Constitution has been denied in that Petitioner's counsel failed to object to testimony concerning the basic element of "value" which was legally insufficient to support a conviction for a felony and because said issue was not raised by counsel on appeal.

2. Whether Petitioner's rights under the due process clause of the Fourteenth Amendment were denied when the State of Georgia did not prove the elements of Theft by Taking (felony) beyond a reasonable doubt in that the element of "value" was not shown to exceed the amount required by statute to support a felony conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This cause was initially tried before a jury in the Superior Court of Muscogee County, Georgia on August 22, 1978. The Defendant was found guilty of theft by taking pursuant to Ga. Code Ann. §26-1802 and sentenced to serve three years in the penitentiary.

Following said conviction and sentence, Petitioner appealed his judgment of conviction and sentence entered thereon to the Court of Appeals of the State of Georgia, said appeal being denied in the case of *Barraza v. State*, 149 Ga. App. 738 (1979).

Petitioner timely filed a Motion for Rehearing on April 18, 1979, said Motion being denied on April 30, 1979.

Petitioner then filed an Application for Writ of Certiorari in the Supreme Court of Georgia on May 28, 1979. This Application was denied on June 20, 1979.

STATEMENT OF FACTS

(a) On or about March 9, 1978, an empty gray cash register was stolen from a restaurant in Columbus, Georgia. A restaurant employee testified that she saw the Petitioner and another man lifting a cash register into the van of co-defendant Rodrigo Sewell near closing time (T-12-14).

(b) The co-defendant, Sewell, testified that he was the driver of the van and that a third man came out of the restaurant carrying the cash register and yelling for help. Sewell then testified that the Petitioner got out of the van and assisted the third man in loading the cash register into the van (T-57, 58). Sewell stated that there had been no prior discussions with the Petitioner

or the third man about taking the cash register. After the three men were inside the truck, Sewell testified, "We told him he was crazy, he shouldn't have done it. That's what we told him." (T-58).

(c) The owner of the restaurant testified that he had a cash register in both the lounge and the restaurant and that the cash register was taken from the restaurant which was closed. When questioned concerning the value of the cash register, Mr. Collazo (the owner) testified, "Well, I think it was worth about $200.00." (T-56).

(d) The co-defendant, Rodrigo Sewell, pled guilty to theft by taking and received a misdemeanor sentence on October 5, 1978 (R-5). Petitioner's trial for theft by taking occurred on August 22, 1978 and he was convicted and sentenced on the same day. Petitioner was sentenced for a felony and received three years in the penitentiary (R-5).

REASONS FOR GRANTING THE WRIT

The instant Petition relates to standards for determining whether counsel is effective in a given case. Petitioner submits that his right to effective assistance of counsel has been denied regardless of the applicable standard.

It has long been recognized that the right to counsel is the right to the effective assistance of counsel. See *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Powell v. Alabama,* 287 U.S. 45 (1932); *Reece v. Georgia,* 350 U.S. 85 (1955); *Glasser v. U.S.,* 315 U.S. 60 (1942).

However, this Honorable Court has not explicitly defined what is meant by "effective assistance of counsel" although it has provided us with some general language concerning this grave issue. In *McMann v. Richardson,*

397 U.S. 759 (1970), it was stated that a defense attorney must act

> "within the range of competence demanded of attorneys in criminal cases. . . . defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this, we think the matter for the most part, should be left to the good sense and discretion of the trial court with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." 397 U.S. at 771.

The Georgia Supreme Court has stated that the effectiveness of counsel cannot be measured only by the results of a criminal trial or appeal, but only on the "reasonable effectiveness" of counsel at the time services were rendered. *Pitts v. Glass,* 231 Ga. 638, 203 S.E.2d 515 (1974). This does not mean errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir. 1960).

A careful examination of the record below shows that the Petitioner was ineffectively represented at both the trial and Appellate levels. Petitioner's counsel failed to object to opinion testimony as to the value of the stolen cash register when the restaurant owner testified, "Well, I *think* it was worth about $200.00" (T-6). Although this testimony may show that the cash register had some value, it was legally insufficient to support a felony conviction for theft by taking.

The Georgia law on this point was clearly stated in *Dotson v. State,* 144 Ga. App. 113, 240 S.E.2d 238 (1977).

> "2. The value of the pistol was alleged to be in excess of $100. The police officer testified that while he was unfamiliar with current prices, the value of the pistol was in the 'neighborhood of $200'; and that he purchased it three years ago for $160. There was no other evidence of value. This testimony was admitted without objection. In *Hoard v. Wiley,* 113 Ga. App. 328, 147 S.E.2d 782, it was held that an owner of property may not testify as to his opinion of the value of the property without giving his reasons therefor and an opinion as to value based solely on cost price is inadmissible in evidence as it has no probative value; and if admitted without objection it cannot support a verdict. This testimony thus is insufficient to authorize a finding that the value of the pistol was more than $100. However, the evidence authorized a finding that the pistol was of some value which will authorize a conviction of theft by taking and sentencing as for a misdemeanor under Code §26-1802 and 1812, respectively. *Crowley v. State,* 141 Ga. App. 867, 234 S.E.2d 700. We affirm the conviction of theft by taking of property of some value but direct that the sentence for this offense be vacated and the defendant be re-sentenced as for a misdemeanor."

At the date of the Petitioner's arrest, the following Georgia Statute was in effect.

> Code §26-1812 A person convicted of violation of Sections 26-1802, . . . shall be punished as for a misdemeanor except: (a) If the property which was the subject of the theft exceeded $100.00 in value, or was an automobile or other motor vehicle, by imprisonment for not less than one and not more than ten years, or, in the discretion of the trial judge, as for a misdemeanor . . .

However, at the time of the Petitioner's *trial,* the statutory amount required to support a conviction for a felony had been raised to an amount in excess of $200.00. Ga. Code Ann. §26-1812 (a) (Acts 1968, pp. 1249, 1295; 1972, pp. 841, 842; 1978, pp. 1457, 1458, eff. July 1, 1978.)

If the latter statute was applicable, it is clear from the face of the testimony that the Petitioner could not have been convicted for a felony because it was not shown that the item in question was of a value *in excess* of $200.00.

Petitioner's conviction for a felony is equally unsupported under the former statute which requires the value to exceed $100.00. The only testimony concerning the value of the cash register was the bald assertion made by the restaurant owner that it was worth $200.00. Since this testimony was legally insufficient to support the proposition offered, the Petitioner should have been sentenced for a misdemeanor.

This error on the part of Petitioner's counsel cannot be construed as a "tactical" or "strategic" decision which is the exclusive province of the lawyer after consultation with his client. *Reid v. State,* 235 Ga. 378, 379, 219 S.E.2d 740, 742 (1975), quoting ABA standards relating to the Administration of Criminal Justice (1974), the Defense Function, §5.2 (b).

Petitioner submits that he is not making a judgment based on mere hindsight or "Monday morning quarterbacking". The error complained of herein goes to the very elements of the crime charged against the Petitioner. Counsel's inability to recognize that the element of value necessary to support a conviction for a felony had not

been shown cannot be considered a harmless oversight. This unpardonable error has resulted in the Petitioner's detainment for a crime he did not commit.

To compound the problems above, this glaring error was not raised by Petitioner's counsel on appeal. It is noteworthy that the Appellant's argument consumed all of one and one-half pages in his original brief in the Georgia Court of Appeals. Petitioner admits that his counsel cannot be deemed ineffective on the basis of brevity alone but submits that this is a factor to be considered in evaluating Petitioner's claim. In a case bristling with arguable claims, Petitioner's counsel adopted the ludicrous approach of merely asserting on general grounds that the evidence was insufficient to support a conviction in a case where there was an eyewitness who positively identified the Petitioner. The effect of this meritless argument was an affirmation of an illegal conviction and sentence.

The most compelling reason Petitioner can offer this Honorable Court to grant Certiorari is to resolve the conflict among the lower courts as to the proper standard for evaluating effective assistance of counsel. The time has come to resolve the discrepancies among the various jurisdictions and insure that all defendants throughout this Country receive the full and adequate representation that is guaranteed them by the Sixth Amendment of the Constitution.

Many State Supreme Courts are adopting a "reasonableness" test for measuring effective assistance of counsel. The United States Courts of Appeals apply different tests in determining whether counsel is effective in a given case, the least demanding of which is the "farce and mockery" of justice standard which is still used in the Second and Tenth Circuits. *United States v. Yanishefsky,* 500

F.2d 1327, 1333 (2nd Cir. 1974); *Ellis v. Oklahoma,* 430 F.2d 1352, 1356 (10th Cir. 1970).

The Third and the Seventh Circuits use a comparative community standard in measuring the effectiveness of representation while the Fifth and Sixth Circuits adhere to the "reasonably likely to render and rendering reasonably effective assistance" test which is followed in Georgia. See *Moore v. United States,* 432 F.2d 730, 736 (3rd Cir. 1970); *United States ex rel. Williams v. Twomey,* 510 F.2d 634, 641 (7th Cir.), Cert. denied, 423 U.S. 876 (1975); *MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960), Cert. denied, 368 U.S. 877 (1961); *Beasly v. United States,* 491 F.2d 687 (6th Cir. 1974).

The various nebulous standards which exist today serve only to exacerbate the real problem that lies behind this court-resurrected shield. Petitioner submits that this lack of sufficient guidelines has served as an expedient tool for timid courts who choose not to hear these most serious claims. This is exactly what has occurred in the case sub judice.

The due process clauses of our great Constitution serve to protect an individual when government or state action adversely affects that person's "liberty". The threshold requirement of due process is that there be some fair procedure for determining whether an individual has lawfully been taken into custody by the State. This requirement mandates that the State prove beyond a reasonable doubt every element which constitutes the crime charged against a defendant. *In re Winship,* 397 U.S. 358 (1970); *Mullany v. Wilbur,* 421 U.S. 684 (1975). The Petitioner has not been afforded this constitutional guarantee. The element of value has not been proved beyond a reasonable doubt in the case sub judice and therefore the Petitioner has been incarcerated illegally.

CONCLUSION

For all the foregoing reasons, Petition for Writ of Certiorari should be allowed to review the instant decision of the Georgia Court of Appeals.

Respectfully submitted,

JOHN C. SWEARINGEN, JR.
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Attorneys for Petitioner

APPENDIX

APPENDIX "A"

BARRAZA
v.
The STATE.

No. 57454.

Court of Appeals of Georgia.

Submitted March 8, 1979.

Decided April 9, 1979.

Rehearing Denied April 30, 1979.

Certiorari Denied June 20, 1979.

Defendant was convicted in the Superior Court, Muscogee County, Land, J., of theft by taking, and he appealed. The Court of Appeals, Deen, C. J., held that: (1) where one of witnesses was proved to have made contradictory statements, effect of such impeachment was solely for jury decision; (2) evidence was sufficient to sustain conviction, and (3) judge acted correctly in recalling jury in order to read them definition of theft by taking which he had inadvertently omitted from original instruction and, in open court, charging on provisions of statute relating to parties to crime in response to jury request for further instructions on accomplices.

Affirmed.

1. Criminal Law (Key) 742(3)

Where one of witnesses in prosecution for theft by taking was proved to have made contradictory statements, effect of such impeachment was solely for jury decision. Code, § 38-1803.

2. Larceny (Key) 55

Evidence was sufficient to sustain conviction for theft by taking.

3. Criminal Law (Key) 863(1), 864

Court has right, after jury has retired to consider its verdict, to call jury back into courtroom and either give further instructions which have been omitted through oversight or, on receiving request for further instructions, to give such reply as facts may warrant; however, court may not speak to one or more of jurors out of hearing of parties and their attorneys.

4. Criminal Law (Key) 863(1)

In prosecution for theft by taking, judge acted correctly in recalling jury in order to read them definition of theft by taking which he had inadvertently omitted from original instructions and in charging jury on provisions of statute relating to parties to crime in response to jury request for further instructions on accomplices. Code, § 26-801.

Allison W. Davidson, Ben B. Philips, Columbus, for appellant.

William J. Smith, Dist. Atty., Douglas C. Pullen, Asst. Dist. Atty., for appellee.

DEEN, Chief Judge.

1. On the appellant's trial for theft by taking, a restaurant employee testified that she saw him and another man lifting a cash register into the van of the witness Rodrigo Sewell. It was established that the register had been stolen from within the restaurant. Sewell testified that he was driving the van, that the third man came out from the restaurant carrying the machine and the appellant helped him put it in the vehicle; they went to the other man's house, and the appellant took the cash register and threw it in a creek. Sewell further admitted that he had originally, on being questioned, insisted that he knew nothing about a cash register or about the defendant having stolen one. Asked why he changed his story he replied that he was tired of lying.

[1, 2] Based on this testimony, the appellant contends that the evidence is insufficient to sustain the conviction. Undoubtedly one of the witnesses was proved to have made contradictory statements, a method of impeachment under Code § 38-1803, the effect of which is solely for jury decision. *Scoggins v. State,* 98 Ga.App. 360(7), 106 S.E.2d 39 (1958). The evidence was sufficient.

[3] 2. The court has a perfect right, after the jury has retired to consider its verdict, to call the jury back into the courtroom and either give further instructions which have been omitted through oversight or, on receiving a request for further instructions, to give such reply as the facts may warrant. *Central R., etc., Co. v. Neighbors,* 83 Ga. 444, 447(2), 10 S.E. 115 (1889). What he should not do is to speak to one or more of them out of the hearing of the parties and their attorneys. *Gibson v. Gibson,* 54 Ga.App. 187(5), 187 S.E. 155 (1936).

[4] In this case the judge recalled the jury in order to read them the definition of theft by taking, which he had inadvertently omitted from the original instructions. Later the jury requested further instructions on "accomplices" and the judge, in open court, charged the provisions of Code § 26-801 relating to parties to a crime. His actions in both cases were entirely correct.

Judgment affirmed.

McMURRAY, P. J., and SHULMAN, J., concur.

APPENDIX "B"

COURT OF APPEALS
of the State of Georgia

ATLANTA, April 30, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

57454. Anthony Barraza v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

APPENDIX "C"

CLERK SUPREME COURT
506 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334

MR. Ben B. Phillips
ATTORNEY AT LAW,
P.O. Box 2808

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CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta JUN 20 1979

Dear Sir:
Case No. 35130 Barraza v. The State

The Supreme Court today denied the writ of certiorari in this case.
All the justices concur.

Very truly yours,
MRS. JOLINE B. WILLIAMS, Clerk